



December 5, 2011

Electronically filed via ECF  
Courtesy copy via U.S. mail

The Hon. Nicholas G. Garaufis  
United States District Judge  
Eastern District of New York  
225 Cadman Plaza East  
Brooklyn, NY 11201

Re: State of New York v. Army Corps of Engineers et al., 1:11-cv-2599-NGG-CLP;  
DRN et al. v. Army Corps of Engineers et al., 1:11-cv-3780-NGG-CLP;  
DCS v. Army Corps of Engineers, et al., 1:11-cv-3857-NGG-CLP.

Dear Judge Garaufis:

I respectfully write on behalf of all Plaintiffs in the above-referenced consolidated cases to request that a pre-motion conference be scheduled to address proposed changes in the schedule arising from Defendants' service of motion papers on November 1, 2011, and Plaintiff State of New York's subsequent filing of an amended complaint to join Defendants Delaware River Basin Commission and Carol Collier ("DRBC Defendants") in its action.

The papers served by Defendants Army Corps of Engineers and other defendants ("Federal Member Defendants") included a motion for summary judgment that Defendants had not obtained prior authorization from the Court to serve or file. The memorandum served by Defendants Delaware River Basin Commission and Carol Collier ("DRBC Defendants") included a detailed factual declaration and acknowledged express rights of action to sue DRBC outside the context of the Administrative Procedure Act. In light of that memorandum and additional research, Plaintiff State of New York amended its complaint to now join the DRBC Defendants in its action.

Counsel for Plaintiffs have conferred with Defendants' counsel, but have not reached agreement on a schedule for moving forward. Plaintiffs have agreed to provide Defendants additional time to serve dispositive motions concerning the State's amended complaint, but wish to include

DELAWARE RIVERKEEPER NETWORK  
925 Canal Street, Suite 3701  
Bristol, PA 19007  
Office: (215) 369-1188  
fax: (215) 369-1181  
dmr@delawareriverkeeper.org  
www.delawareriverkeeper.org

cross-motions for summary judgment as part of the schedule. Defendants do not agree to such motions.

### Procedural Background

Federal Member Defendants filed a pre-motion letter seeking approval to file a Rule 12(b)(1) motion to dismiss. Following a conference, the court entered an order on August 12, 2011, including a briefing schedule for the service of “dispositive motions pursuant to Fed.R.Civ. P. 12(b)(1) and 12(b)(6).” That order was subsequently amended twice to provide additional time for service of papers in such motions, at the requests of Federal Member Defendants and Plaintiff New York State, respectively.

On November 1, 2011, Federal Member Defendants served a motion to dismiss or, “in the alternative, for summary judgment,” and DRBC Defendants served its papers in support of a motion to dismiss. By the current scheduling order as amended by the Court on November 9, 2011, Plaintiffs’ response papers to Federal Member Defendants’ motion to dismiss the no-longer operative complaint would be served by December 19, 2011.

In light of the DRBC Defendants’ motion papers which now acknowledged an express right of action to sue the DRBC under the Delaware River Basin Compact and further research, on November 22, 2011, the State of New York filed an amended complaint as of right pursuant to Fed. R. Civ. P. 15(a)(1)(B) in State of New York v. Army Corps of Engineers et al., 1:11-cv-2599-NGG-CLP, naming the DRBC Defendants as additional defendants and adding a second cause of action against them for violations of the National Environmental Policy Act with respect to the development of DRBC regulations to permit natural gas development in the Delaware River Basin. The amended complaint included other minor factual revisions and some updates, but did not assert any new causes of action against the Federal Member Defendants.

The Federal Member Defendants’ response to the amended complaint is due by December 6, 2011, pursuant to Fed. R. Civ. P. 15(a)(3). Federal Member Defendants wish to file a dispositive motion concerning the State’s amended complaint and serve a revised memorandum in support of their motion to dismiss or, in the alternative, for summary judgment, with respect to that pleading which memorandum would apply as well to the other consolidated actions. Federal Member Defendants state they need additional time, beyond December 6, to do so, and Plaintiffs are willing to accommodate them.

### Plaintiffs’ Cross-motions for Summary Judgment

Liability on Plaintiffs’ claims presents questions of law relating to jurisdiction and whether Defendants are required to comply with NEPA. Defendants assert that Plaintiffs lack standing, and Plaintiffs intend to file affidavits to rebut that defense. It would serve the interests of judicial efficiency and speedy resolution to combine Plaintiffs’ papers in opposition to Defendants’ motions to dismiss (or in the alternative for summary judgment) and the detailed factual declaration served by the DRBC Defendants with cross-motions for summary judgment that would rely on such affidavits.

Under Fed. R. Civ. P. 56(b), a party may file a motion for summary judgment “at any time until 30 days after the close of all discovery.” See Stein v. Oshinsky, 348 F.2d 999 (2d Cir. 1965) (plaintiff may bring a motion for summary judgment in response to a motion by a defendant to dismiss for lack of subject matter jurisdiction and failure to state a claim). See also Citizens for Clean Air, Inc. v. Corps of Engineers, 349 F. Supp. 696 (S.D.N.Y. 1972) (cross-motion for summary judgment granted to plaintiff for failure to perform EIS under NEPA where defendants moved to dismiss and had not filed an answer); Owner-Operator Independent Drivers Ass’n v. C.R. England, Inc., 325 F. Supp.2d 1252 (D. Utah 2004).

To avoid unnecessary duplication, Plaintiffs Delaware Riverkeeper Network et al. and Plaintiff Damascus Citizens for Sustainability will file one joint set of moving papers and memoranda with the Court.

#### Request to Approve Proposed Amended Briefing Schedule

Plaintiffs proposed the following amended briefing schedule, which we respectfully submit for your approval:

- |                          |   |
|--------------------------|---|
| <b>December 23, 2011</b> | Federal Member Defendants serve revised memorandum in support of their motion to dismiss or, in the alternative, for summary judgment.  |
|                          | DRBC Defendants serve motion to dismiss and memorandum in support with respect to the State’s amended complaint.  |
| <b>January 20, 2012</b>  | Plaintiffs State of New York and DRN <u>et al.</u> each serve a cross-motion for summary judgment, affidavits, and a combined memorandum in support of cross-motion for summary judgment and in opposition to motions to dismiss. |
| <b>February 13, 2012</b> | Federal Member Defendants and DRBC Defendants each serve a memorandum replying in support of their motions to dismiss (or, in the alternative, for summary judgment) and in opposition to cross-motions for summary judgment.     |
| <b>March 7, 2012</b>     | Plaintiffs State of New York and DRN <u>et al.</u> each serve replies in support of cross-motions for summary judgment.   |
| <b>To be scheduled</b>   | Oral argument to be scheduled at the Court’s convenience.   |

Unless the Court orders otherwise, all motion papers will be filed when the motions are fully briefed.

#### Request for Permission to File Overlength Briefs

The parties had previously obtained the Court’s permission to file memoranda of forty pages in support of and opposition to dispositive motions with twenty-five pages for reply briefs. Because

Plaintiffs intend to combine their briefs opposing Defendants' motions and supporting their cross-motions and because all plaintiffs other than the State will be making a joint submittal, Plaintiffs respectfully request that the Court permit all parties to file memoranda of fifty pages in support of and in opposition to the cross-motions for summary judgment and memoranda of twenty-five pages for Plaintiffs' reply briefs.

Respectfully submitted,

/s Jane P. Davenport

Jane P. Davenport  
Senior Attorney, Delaware Riverkeeper Network  
(215) 369-1188 x106

cc: Counsel for the parties and amici curiae (via ECF)